

84-673

NO.

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ALEXANDER L. STEVENS

CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1984

STANLEY J. PERWIN,
Petitioner,

vs.

ROBERT N. WILENTZ, Chief Justice, Supreme Court of
New Jersey, *et al.,*
Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT**

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Statement of Questions Involved

1. Whether the United States District Court may refuse to exercise jurisdiction over a constitutional challenge to the rules or lack thereof for re admission to the bar of the court of a state.

2. Whether an announced policy of no reinstatement for an attorney once disbarred is contrary to the due process clause of the 14th Amendment to the Constitution of the United States.

3. Whether the failure of the Court, having jurisdiction over the admission to the practice of law, to establish standards differentiating between the levels of punishment or discipline of attorneys denies equal protection of the law.



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Respondents.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
THIRD CIRCUIT**

Stanley J. Perwin, your petitioner, prays that a writ of certiorari issue to review the Judgment of the United States Court of Appeals for the Third Circuit, entered in the above-entitled case on July 24, 1984.

Opinion Below

The opinion of the court below (*infra* Appendix A, pp. 1a to 4a) has not yet been reported.

Jurisdiction

The judgment of the Court of Appeals was entered on July 24, 1984. The jurisdiction of this Court is invoked under Title 28 U.S.C. Sec. 1254(1).

Constitutional Provisions Involved

The terms of the 14th Amendment to the United States Constitution are set forth in full (*infra*, Appendix B).

Statement of the Case

Stanley J. Perwin, the Petitioner, was an attorney in the State of New Jersey who was disbarred by order of the Supreme Court of that State in 1972.¹

The Supreme Court of New Jersey at the time of disbarment provided in a reported opinion that if Mr. Perwin should prevail in efforts to set aside the criminal conviction which formed the basis for the order of disbarment, then

“ . . . he may apply to us for reconsideration of this order.”

Perwin applied for reinstatement in 1974 having been successful in the United States District Court on a Petition for Writ of Habeas Corpus. At the time of his application for reinstatement the indictments upon which the convictions had been based had been dismissed. The Supreme Court after referring the matter to a County Ethics Committee denied Perwin's application without

¹ *In Re Perwin*, 287 A.2d 3, 60 N.J. 174 (1972).

opinion. Approximately five years later Perwin again applied for reinstatement and the Supreme Court of New Jersey denied his application again, this time without a hearing or an opinion.

Perwin then filed an action in the United States District Court of the District of New Jersey under Title 42 U.S.C. Sec. 1983 against *inter alia* the Chief Justice and Associate Justices of the Supreme Court of New Jersey alleging that his constitutional rights had been infringed. It should be noted that the action taken in the United States District Court was cornered on the complaint by Perwin that though the State of New Jersey had in various ways announced a policy of no reinstatement once there was a disbarment the State had indeed on three separate occasions in recent years entered an order of reinstatement. It was further his complaint that while the Supreme Court of New Jersey administered the disciplinary rules on a "case by case" basis there was no standard by which a delinquent attorney could anticipate the measure of the discipline which would be meted out to him. It was pointed out that in recent years in the State of New Jersey attorneys who had been convicted of serious offenses were merely suspended while others involved in less egregious crimes were disbarred. The methods of imposing disciplinary sanctions were not even-handed but gave the impression that the court may have showed favoritism.

Upon motion by the attorney representing the Supreme Court of New Jersey, the District Judge granted summary judgment for the defendants concluding that the District Court had no subject matter jurisdiction to review a decision of the State's highest court. The District Court further held that even if Perwin's challenge to the disciplinary rules was cognizable such a challenge was barred by the Doctrine of Collateral Estoppel because the complaint had been presented to the Supreme Court of New Jersey which had rejected those claims.

Perwin appealed the decision of the District Court to the Court of Appeals for the Third Circuit. That Court after argument affirmed the District Court. The Circuit Court came to essentially the same conclusion as did the District Court and decided the matter on the basis that the New Jersey Court had adjudicated the claims of Perwin and had rejected them. The Court refused to consider that Perwin's action in the District Court was a new independent action complaining not about the decision of the New Jersey Supreme Court in the matter adjudicated by it, but complaining instead about the manner by which the Supreme Court of New Jersey administered attorney disciplinary proceedings.

Reasons for Granting the Writ

This case presents important questions concerning attorney discipline. It raises the issue of whether a Supreme Court of a State can meet out sanctions to errant attorneys without establishing standards for such sanctions. The Court of Appeals has held that the District Court was without jurisdiction to consider an attack made upon the lack of disciplinary rules concerned with penalties to be imposed upon subject attorneys. As a result, this Petitioner has no place to turn for relief from what may be an arbitrary adverse decision by the sole agency charged with responsibility for determining the qualifications of members of the bar. In this case the Supreme Court of New Jersey invited the application by Perwin and on two separate occasions turned him down without opinion. The Court has never stated why Perwin who petitioned the Court on two separate occasions unconvicted of any criminal offense, was to be eternally barred from practicing his chosen profession.

The ruling of the Appellate Court misconstrued the effect of this Court's decision in *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S.Ct. 1303, 75 L.Ed.2d 206 (1983), particularly that part of the decision pertaining to the jurisdiction of the District Court to review final determinations made by State Courts in bar application matters.

I

The federal action by the plaintiff here did not constitute an attempt to appeal from a judicial decision of the Supreme Court of the State of New Jersey.

The Courts below in deciding that there was no jurisdiction in the Federal Court for the action brought by Perwin have misconstrued the effect of that action. In *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 103 S. Ct. 1303, 75 L.Ed2d 206 (1983) this Court distinguished between general challenges to State Bar Admission Rules and claims that a State Court had unlawfully denied a particular applicant admission.

It is not disputed that a final judgment in a State Court proceeding may not be upset in an original suit in Federal District Court. See *MacKay v. Nesbett*, 412 F.2d 846 (9th Cir. 1969) *cert. den.* 396 U.S. 960, 90 S. Ct. 435, 24 L.Ed.2d 425 (1969). However, in *Doe v. Pringle*, 550 F.2d 596 (10th Cir. 1976) *cert. den.* 431 U.S. 916, 97 S. Ct. 2179, 53 L.Ed2d, 227 (1977) it was held that a Federal District Court may exercise jurisdiction in the review of an alleged federal constitutional or equal protection deprivation in the State's adoption of or administration of general rules and regulations governing admission to the bar. That decision was cited with approval by this Court in *District of Columbia Court of Appeals v. Feldman*, *supra*.

The 9th Circuit Court of Appeals in *Brown v. Board of Bar Examiners of the State of Nevada*, 623 F.2d, 605 F.2d 605 (9th Cir. 1980) held that the United States District Court may assert jurisdiction to insure that generally applicable rules or procedures do not infringe on constitutionally protected rights. See also, *Peterson v. Sheran*, 635 F.2d 1335 (8th Cir. 1980).

In the courts below the Petitioner Perwin insisted that his action was neither an appeal from an adjudication by the Supreme Court of the State of New Jersey nor a claim of present right to admission to the bar of the State of New Jersey. The action in fact was a lawsuit against the Supreme Court of the State of New Jersey among others complaining that it did not have rules for reinstatement of disbarred attorneys and further had no standards governing the nature and extent of the sanctions to be imposed upon errant attorneys.

In this court in the case of *Supreme Court of Virginia v. Consumer Union*, 446 U.S. 719, 731, 100 S. Ct., 1967, 1974, 64 L.Ed.2d, 641 (1980) it was stated:

"Disciplinary rules are rules of general application and are statutory in character. They are not on parties litigant but on all those who practice law in Virginia. They do not arise out of a controversy which must be adjudicated but instead out of a need to regulate the conduct for the protection of all its citizens. It is evident that, in enacting disciplinary rules the Supreme Court of Virginia is constituted a legislature."

To reiterate, it is the position of Perwin that had he been successful in his litigation the result would not be an order compelling the Supreme Court of New Jersey to readmit him to the practice of law. The most positive

result of that action would have been to require the Supreme Court of the State of New Jersey to set up rules whereby he would be eligible to apply for admission to the bar provided he could meet the criteria established by the court.

The claims presented by Perwin are not inextricably intertwined with the proceedings which took place before the Supreme Court of New Jersey on Perwin's applications for readmission. Petitioner's action is a challenge directed toward actions of the Supreme Court of New Jersey where it acts in non-judicial capacity in the promulgation of rules and regulations governing the bar.

Again, the Petitioner Perwin does not seek the review of a final state court judgment under this Title 28 U.S.C. Sect. 1983 action.

II

The petitioner was not precluded from raising constitutional issues in a civil rights action in the federal court because of a denial of his prior application for readmission to the bar.

The decisions of the courts below go far beyond the application of the concepts of issue and claim preclusion as determined in *Allen v. McCurry*, 449 U.S. 90, 101 S. Ct. 411, 66 L.E.2d 308 (1980) and *Migra v. Warren City School District*, — U.S. —, 104 S. Ct. 892 (1984). In this matter the decision in the trial court renders ineffective the provisions of Title 28 U.S.C. Sec. 1983 and encroaches upon the rights of aggrieved parties as contemplated by the enactment of Title 28 U.S.C. Sec. 1983.

In *Allen v. McCurry*, *supra*, this court held that issues actually litigated in a state court proceeding are entitled

to the same preclusive effect in a subsequent action in the federal court as in the courts of the State wherein the judgment was rendered.

This Court in *Migra, supra.*, held that federal issues that could have been raised but were not raised in an earlier state court proceeding now face the same preclusive effect in subsequent litigation as those issues which were actually raised.

In the matter, sub judice, Perwin's cause of action was separate and distinct from that asserted before the Supreme Court of New Jersey.

In the present action Perwin claimed an unconstitutional adoption, promulgation and administration of the disciplinary rules of the Supreme Court of New Jersey. His complaint singled out the process for an admission and readmission to the state bar. The defendants in this action were the arbiters in the previous action. Consequently, the prior rulings of the Supreme Court of New Jersey can only preclude those questions, issues of fact which were actually litigated in the prior action.

In plain words, the state court proceeding was an application for admission to the bar while the present action is a lawsuit against the members of the rule-making body concerning the rules themselves.

In applying the foregoing principle the courts below went far beyond the scope of *Migra, supra* and *Allen, supra*. Since the constitutionality of the disciplinary rules were neither in direct issue nor collaterally before the Supreme Court of New Jersey, the concepts of issue preclusion or claim preclusion do not bar the federal action.

Perwin could not have proceeded in any forum other than the Supreme Court of New Jersey in his application for readmission to the bar. See N.J. Constitution, Art. 6,

Sec. 2, paragraph 3 (Appendix C). Petitioner was not truly in an offensive posture in his state court proceeding—he could not have litigated initially his federal claim in a federal forum. Only when the application for the license was rejected did his action under Title 28, U.S.C., Sect. 1983, become cognizable.

This situation is distinguished from this court's ruling in *In re Summers*, 325 U.S. 561, 65 S.Ct.1307, 89 L.Ed. 1795 (1945) wherein there was a refusal by the Committee on Character and Fitness to issue the necessary certificate for admission to the bar. The Supreme Court of Illinois affirmed that refusal by the Committee. In *Summers, supra*, the applicant had the option of Title 28 U.S.C. 1983 or pursuing his remedy to the Supreme Court of Illinois. The affirmance of that action laid the foundation for the petition to this court as “a case and controversy.” See *Tang v. Appellate Division of N.Y. First Department*, 487 F.2d 138 (2nd Cir. 1973) *cert. den.* 416 U.S. 906, 94 S.Ct. 1611, 10 L.Ed.2d 111 (1974) wherein an appeal from the Character on Fitness Committee to the Appellate Division of the New York Supreme Court was considered to have a preclusive effect in the federal district court.

In rejecting Perwin's application for readmission to the bar, the Supreme Court of New Jersey performed, no more and no less than, the administrative function of a licensing board. The question therefore arises as to what preclusive effect should be accorded an administrative decision.

In *Federal Communications Commission v. Pottsville Broadcasting Co.*, 309 U.S. 134, 142, 60 S. Ct. 437, 84 L. Ed. 656 (1940) this court pointed out that modern administrative tribunals are generally the outgrowth of conditions which differ from those applicable to common law courts. Traditionally, courts deal primarily with adversary

proceedings between litigants seeking to adjust conflicting claims. That is not the situation in an application for a professional license.

The applicant was before the Supreme Court of New Jersey not as litigant but, because in its administrative capacity, the court was the only body empowered by the State Constitution to consider the application.

If the holding of the Circuit Court is allowed to stand it will have far reaching effects in areas where the court is both the "first step" toward a professional license and the final arbiter of the same process. State-created rules governing the grant or denial of licenses will no longer have to comply with federal constitutional standards and would be administered at the will of the licensing board especially where the highest court in the state fills the dual role of a licensing board and the court.

III

The rule precluding a disbarred attorney from ever thereafter being readmitted to the practice of law violates the 14th Amendment to the constitution through the creation of an irrebutable presumption of perpetual unfitness.

In the State of New Jersey the court deals with errant attorneys on a case by case basis without ever defining those areas which will warrant "permanent" disbarment or those areas which warrant only a suspension from which eventually reinstatement may follow.²

² In one set of circumstances (i.e.) the embezzlement or misapplication of trust funds the Supreme Court has warned the bar of resultant disbarment. *In re Wilson*, 409 A.2d 53, 81 N.J. 451 (N.J. 1979); *Cf. In re Smock*, 432 A.2d 34, 86 N.J. 426 (N.J. 1981).

By the decision rendered in this matter the courts below have construed the action by Perwin as a continuation of the proceedings before the Supreme Court of New Jersey. In any event the decisions of the court below have effectively approved the actions of the Supreme Court of New Jersey.

One of the pronouncements by the Supreme Court of New Jersey has been that disbarment is permanent. By taking that stance, the New Jersey Court has denied the need for rules which provide for a hearing on application for reinstatement or for that matter any rules which provide for criteria whereby an attorney once disbarred might demonstrate his rehabilitation and therefore his fitness to return to the practice of law.

The policy of the Supreme Court of New Jersey creates a permanent irrebutable presumption that all disbarred attorneys are forever to be a member of the bar of the State of New Jersey. Such presumptions are abhorrent because they preclude any individual determination of the facts upon which substantive rights or obligations may depend. *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, 94 S.Ct. 791, 39 L.Ed.2d, 52 (1974). *Stanley v. Illinois*, 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551 (1972). Underlying the irrebutable presumption doctrine, is the recognition that an individual allocation to a specific classification should have the right to a hearing to determine whether in a particular instance that classification treats the individual unreasonably. See: *The Irrebutable Presumption Doctrine in the Supreme Court*, 87 Harvard Law Review, 1534, 1538 (1974).

Recognizing that the condition of permanent preclusion from the practice of law must be related rationally to a legitimate state interest in order to stand, the courts below have brushed away the Petitioner's contentions on

the ground that such a condition is indeed related. It is with that determination that we take issue. A reference to the Rules of Admission of Practice of the various states of the Union including those pertinent to admission in the various federal courts will reveal that in most jurisdictions disbarment is not considered permanent but instead due regard is paid to the potential for reformation and rehabilitation. Upon demonstration of good character and fitness to practice disbarred attorneys have been returned to good standing.

See e.g. *In re Hiss*, 333 N.E.2d 429 (Sup. Jud. Ct. Mass. 1975).

We do not question the need for disciplinary sanctions which from time to time are imposed upon errant attorneys. For the purpose of purifying the bar and protecting the public, the power to sanction is a necessary part of the constitutional function imposed upon the Supreme Court of the State of New Jersey, by its Constitution. See *In The Matter of Infinito*, 462 A.2d 160, 94 N.J. 50 (1983). It is the distinction between disbarment, which is deemed permanent, in New Jersey, and a suspension, which is not, which creates the constitutional issue.

As we have stated, in New Jersey, an attorney who has been suspended from the practice of law as a result of criminal or ethical infractions, may apply for readmission after a stated period. On the other hand, an attorney, who has been disbarred for whatever the reason, and even as here, has never been convicted of a crime, may not ever successfully apply for readmission.

The situation presented by the uneven treatment of lawyer offenders is such that an attorney, who is "only" suspended by the Supreme Court even though guilty of egregious acts, may prove to the court his rehabilitation

and demonstrate his qualifications and thereafter be readmitted. On the other hand, an attorney, who for whatever reasons was disbarred even though his underlying acts were less serious in nature than the suspended attorney, is deemed never capable of rehabilitation and therefore never qualified for re-entry into the bar.

There is no rational relationship between the arbitrary sanction of permanent disbarment and the stated objective of protecting the public.

Where the rules of court or of the Disciplinary Review Board, appointed by the Supreme Court of New Jersey, provide the standards for readmission to practice of suspended attorneys such rules can be equally administered to filter out a disbarred attorney who may conceivably be a potential recidivist.

The American Bar Association has proposed a uniform rule covering potential readmission to the bar after five years has elapsed from the date of disbarment. That rule provides in pertinent part that readmission can be accomplished if the applicant "... can show by clear and convincing evidence: rehabilitation, fitness to practice, competence and compliance with all applicable discipline or disability orders and rules." Rule 6.2, *Standards for Lawyer Discipline and Disability Proceedings*, approved draft, A.B.A. February, 1979.

Even the disciplinary rules of the United States District Court for the District of New Jersey provide for reinstatement to its bar after five years providing certain criteria are met. See Rule 7G United States District Court Rule, District of New Jersey (Appendix D).

Justice Reid in *Scher v. Assoc. of the Bar of the City of New York*, 347 U.S. 388, 393, 74 S. Ct. 569, 573, 98 L.Ed. 790 (1954) stated:

"The court refers to the language of the order, 'permanently disbarred.' This of course should be read as a disbarment subject to reinstatement Reinstatement may follow a sincere and timely change of attitude. . ."

The position of the Supreme Court of the State of New Jersey wherein it deems disbarment permanent, and suspension potentially temporary, and where the court arbitrarily metes out the sanction of disbarment on one hand, or suspension on the other, for equally serious violations, denies equal protection to those disbarred.

CONCLUSION

For the foregoing reasons, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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October 22, 1984

APPENDIX A

**Memorandum Opinion of the United States Court of
Appeals for the Third Circuit**

**UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

No. 83-5913

STANLEY J. PERWIN,

Appellant,

v.

ROBERT N. WILENTZ, Chief Justice, Supreme Court of New Jersey, ROBERT L. CLIFFORD, SIDNEY M. SCHREIBER, ALLAN B. HANDLER, STEWART G. POLLOCK, DANIEL J. O'HERN and MARIE GARBALDI, Associate Justices of the Supreme Court of New Jersey, STEVEN W. TOWNSEND, Clerk, Supreme Court of New Jersey.

On Appeal from the United States District Court for the
District of New Jersey

Appendix A

(D. C. Civil No. 82-4444)

District Judge: Malcolm Muir

Argued July 19, 1984

Before: SLOVITER, BECKER, *Circuit Judges*, and
FULLAM, *District Judge**

MEMORANDUM OPINION OF THE COURT

(Filed—July 24, 1984)

SLOVITER, *Circuit Judge*.

Stanley J. Perwin, appellant, was a New Jersey attorney disbarred in 1972. He applied for reinstatement in 1974. Following two hearings before the Essex County Ethics Committee, to which the Supreme Court of New Jersey referred his application, the Committee recommended denial and the Supreme Court of New Jersey issued an order denying the motion. Perwin applied again for reinstatement approximately five years later, and the Supreme Court of New Jersey denied his application without opinion.

Perwin then filed an action in the United States District Court for the District of New Jersey under 42 U.S.C. § 1983 against, *inter alia*, the Chief Justice and the Associate Justices of the Supreme Court of New Jersey alleging that his constitutional rights had been infringed. The

* Hon. John P. Fullam, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Appendix A

Honorable Malcolm Muir, of the United States District Court for the Middle District of Pennsylvania, was specially designated to hear this matter. Judge Muir granted summary judgment for the defendants, concluding that the district court had no subject matter jurisdiction to review the decision of the state's highest court, and that to the extent that Perwin's challenge to the disciplinary rules might be cognizable, the district court's consideration of that challenge was barred by the doctrine of collateral estoppel because it had been presented to the Supreme Court of New Jersey which had rejected the constitutional claims. The district court also held, alternatively, that even if it could hear Perwin's constitutional claims they were without merit and must be denied.

We have reviewed the record and the applicable law, and have given Perwin an opportunity to have his contentions presented in oral argument. We conclude that the district court was correct. Under the recent Supreme Court decision in *District of Columbia Court of Appeals v. Feldman*, 103 S. Ct. 1303 (1983), the district court does not have jurisdiction to review final determinations made by a state court in individual petitions in bar application matters, since they are considered to be judicial proceedings. The New Jersey court adjudicated Perwin's claim and rejected it; hence, there was no jurisdiction in the district court. To the extent that Perwin presented an independent, facial challenge to the disciplinary rules, the district court was barred from considering that claim because Perwin's federal constitutional claims were raised by him before the New Jersey court, although they were not discussed by the New Jersey Supreme Court. Finally, we agree with the district court that were we to reach the merits, the action of the Supreme Court of New Jersey

Appendix A

in imposing attorney discipline on a case-by-case basis is rationally related to a legitimate state interest, and hence Perwin's constitutional claims must fail.

We will affirm the judgment of the district court.

TO THE CLERK:

Please file the foregoing opinion.

Circuit Judge

APPENDIX B**Constitutional Provision Involved
Amendment XIV**

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the

Appendix B

United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

APPENDIX C

**New Jersey Constitutional Provision Involved
Article 6, Section 2 Paragraph 3**

3. *Supreme Court rules; admission to practice law; discipline of persons admitted*

3. The Supreme Court shall make rules governing the administration of all courts in the State and, subject to the law, the practice and procedure in all such courts. The Supreme Court shall have jurisdiction over the admission to the practice of law and the discipline of persons admitted.

APPENDIX D

**United States District Court Rule, District of New Jersey
Rule 7G**

G. Reinstatement.

1. After Disbarment or Suspension. An attorney suspended for three months or less shall be automatically reinstated at the end of the period of suspension upon the filing with the court of an affidavit of compliance with the provisions of the order. An attorney suspended for more than three months or disbarred may not resume practice until reinstated by order of this court.

2. Time of Application Following Disbarment. A person who has been disbarred after hearing or by consent may not apply for reinstatement until the expiration of at least five years from the effective date of the disbarment.



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In The
Supreme Court of the United States
October Term, 1984

STANLEY J. PERWIN,
Petitioner,
vs.

ROBERT N. WILENTZ, Chief Justice,
Supreme Court of New Jersey, *et al.*,
Respondents.

**BRIEF IN OPPOSITION TO PETITION FOR A
WRIT OF CERTIORARI ON BEHALF OF
RESPONDENTS WILENTZ, ET AL.**

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QUESTIONS PRESENTED

1. Does a United States District Court have jurisdiction over an action that challenges the final determination of a state court in an attorney disciplinary proceeding and raises issues that are "inextricably intertwined" with the state court determination?

2. Does the doctrine of collateral estoppel prevent a plaintiff from raising federal constitutional claims in a United States District Court if those same claims were previously raised and rejected in a state court?

3. Do the disciplinary rules and practices governing attorney conduct established by the Supreme Court of New Jersey violate due process and equal protection because they provide for the imposition of discipline on a case by case basis and do not authorize readmission after disbarment?

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**BRIEF IN OPPOSITION TO PETITION FOR A
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RESPONDENTS WILENTZ, ET AL.**

The Respondents, Robert N. Wilentz, Chief Justice of the Supreme Court of New Jersey, *et al.*, respectfully request that this Court deny the Petition for Writ of Certiorari seeking to review the opinion of the United States Court of Appeals for the Third Circuit entered in the above-entitled case on July 24, 1984.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit in this matter is contained in Appendix

A of Petitioner's Appendix and is as yet unreported. The opinion of the United States District Court for the District of New Jersey in this case was entered on November 21, 1983 and is contained in the Appendix to this brief. The opinion of the District Court is also unreported.

STATEMENT OF THE CASE

The petitioner in this case, Stanley J. Perwin, was disbarred by the Supreme Court of New Jersey in 1972 following a criminal conviction for defrauding an insurance company. When Perwin succeeded in having the conviction voided on double jeopardy grounds in the context of a *habeas corpus* proceeding, he applied for reinstatement to the New Jersey bar. Following a hearing conducted by the Essex County Ethics Committee, the Supreme Court of New Jersey in October 1976 accepted the Committee's recommendation that the application for reinstatement be denied. Perwin submitted a second application for reinstatement to the bar in 1981. The petition and brief filed in support of this application argued that Perwin had been rehabilitated and that New Jersey's policy of permanent disbarment was constitutionally infirm under the equal protection and due process clauses. The Supreme Court of New Jersey denied Perwin's second application for readmission in April 1982, thereby also rejecting his federal constitutional claims.

Although dissatisfied with this result, Perwin did not seek review in the Supreme Court of the United States. Rather, he filed a Complaint against the Supreme Court of

New Jersey in the United States District Court for the District of New Jersey under 42 U.S.C. §1983. In his Complaint, Perwin alleged that the New Jersey disciplinary rules governing disbarment, both facially and as applied to him, violated equal protection and due process because they provided for the imposition of sanctions on a case by case basis and failed to establish a mechanism for re-admission following disbarment. In response to the Complaint, defendants moved for summary judgment and obtained a favorable ruling from the district court.

The district court rendered three alternative holdings in support of its determination rejecting Perwin's claims. It first concluded that to the extent the Complaint challenged the denial of Perwin's application for reinstatement to the bar by the Supreme Court of New Jersey, or raised issues "inextricably intertwined" with that denial, federal jurisdiction was lacking under *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). The district court also found that the doctrine of collateral estoppel barred review of Perwin's federal constitutional claims because he had previously raised the same claims before the Supreme Court of New Jersey in the context of his reinstatement proceeding. Finally, the district court held that even if it could have entertained Perwin's constitutional claims, it would have found them totally lacking in merit. In this regard, the court held that the imposition of attorney discipline on a case by case basis was rationally related to a legitimate state interest and hence complied with the dictates of equal protection and substantive due process. The court also rejected Perwin's irrebuttable presumption claim because the Supreme Court of New Jersey had, in fact, granted reinstatement to several dis-

barred attorneys despite its general policy of permanent disbarment. The Third Circuit affirmed the ruling of the district court on each of these three alternate grounds.

REASONS FOR DENYING THE WRIT

The writ sought here should be denied because the courts below correctly interpreted and applied the precedents of this Court to the particular facts of this case. Moreover, the judgment issued in favor of the defendants rested on three separate grounds, each of which supports the result reached below. To grant the writ as to any one issue would be futile, therefore, since the judgment would be upheld in any event on an alternate ground. Finally, *certiorari* review is not warranted here on the constitutional issues because they are frivolous, and is not warranted as to the jurisdictional rulings below because they were narrowly drawn, turned on the specific factual context involved, and rested squarely upon the prior decisions of this Court.

A. The Courts Below Correctly Determined That Jurisdiction Was Lacking Because Plaintiff's Action Essentially Sought Review By The Lower Federal Courts Of The Final Determination Of A State Court In A Bar Disciplinary Proceeding.

This Court recently held that federal district courts lack subject matter jurisdiction to review orders of state courts denying particular applications for bar admission. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983). By analogy, this holding applies as well to attorney disciplinary actions taken by state courts. See,

e.g. Silverton v. Department of Treasury, 644 F.2d 1341 (9th Cir. 1981), *cert. denied* 454 U.S. 895 (1981); *Matter of Randall*, 640 F.2d 898 (8th Cir. 1981), *cert. denied* 454 U.S. 880 (1981). Where state courts render final determinations in judicial proceedings such as disbarment or reinstatement actions, review of those determinations can be sought *only* in the Supreme Court of the United States; the district courts, having only original jurisdiction, cannot sit as appellate courts in regard to such judicial decisions rendered by state courts. *Feldman, supra*, 460 U.S. at 476; *Atlantic Coast Line R. Co. v. Engineers*, 398 U.S. 281, 296 (1970); *Rooker v. Fidelity Trust Co.*, 263 U.S. 413, 415 (1923). If Perwin desired further review of the disciplinary actions taken against him by the Supreme Court of New Jersey, including the recent rejection of his second motion for reinstatement, he should have followed "the traditional method of obtaining adjudication of federal constitutional questions arising out of such disciplinary proceedings" mentioned in *Erdman v. Stevens*, 548 F.2d 1205, 1211 (2nd Cir. 1972), *cert. denied* 409 U.S. 889 (1972)—that is, by taking an appeal or filing a petition for a writ of *certiorari* with the Supreme Court of the United States. To the extent that Perwin's federal action can be construed as a challenge to the final determinations of the Supreme Court of New Jersey imposing disbarment upon him and rejecting his motions for reinstatement, then this action is barred for lack of subject matter jurisdiction in federal district court.

Although Perwin attempts to characterize his federal action solely as a challenge to the New Jersey disciplinary procedures regarding disbarment, it is evident that he also tried to have the district court review the disciplinary

actions taken against him by the Supreme Court of New Jersey. The district court held as much when it concluded that Perwin's federal lawsuit included the allegation that the State court acted improperly in denying his application for reinstatement. Regardless of the form or label given by Perwin to his federal action, however, it in fact constituted a challenge to a particular disciplinary determination rendered by the Supreme Court of New Jersey and, as such, must be dismissed as an impermissible collateral attack upon that determination.

While *Feldman* does allow a federal district court to entertain a constitutional challenge to a disciplinary rule of general applicability, 460 U.S. at 483-486, this jurisdiction extends only to claims that challenge the validity of rules promulgated by a state court in a non-judicial proceeding where no final state court adjudication is involved. *Ibid.* See also *Doe v. Pringle*, 550 F.2d 596 (10th Cir. 1976), cert. denied 431 U.S. 916 (1977). Here, however, Perwin freely raised his constitutional challenge to the disciplinary rules before the Supreme Court of New Jersey in the context of his reinstatement proceeding. When that court rejected his application for readmission, therefore, it also rejected his federal constitutional attack upon the disciplinary rules. By intertwining his rules challenge with his reinstatement effort in state court, Perwin foreclosed any opportunity he may otherwise have had to seek review of the New Jersey disciplinary rules in the lower federal courts. For, once the Supreme Court of New Jersey rejected his rules challenge in a judicial proceeding such as a reinstatement action, Perwin's only option was to seek further review of the denial of his constitutional claims in this Court; review of his rules challenge in the district court

was simply not available to him. *Feldman, supra*, 460 U.S. at 476.

Since the lower federal courts properly interpreted and applied *Feldman* to the facts of this case, Perwin's petition for a writ of *certiorari* on this issue should be denied.

B. Since Plaintiff Freely Chose To Litigate His Federal Constitutional Claims Before The Supreme Court Of New Jersey, The Courts Below Properly Prevented Him From Collaterally Attacking The State Court's Rejection Of His Claims In A Federal Civil Rights Action.

The doctrine of collateral estoppel, also known as "issue preclusion," prevents a party in a second lawsuit from raising issues that were litigated in and were necessary to the outcome of the first action. *Allen v. McCurry*, 449 U.S. 90, 94 (1980); *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322 (1979). The purpose of the doctrine is to prevent parties from relitigating issues that they already had a full and fair opportunity to contest in an earlier case. Such preclusion is favored because it conserves judicial resources, prevents the vexation of multiple lawsuits, and supports the finality of judicial decisions. *Montana v. United States*, 440 U.S. 147, 153-154 (1979).

It is well-established that the principles of collateral estoppel apply when plaintiffs in federal actions brought under 42 U.S.C. §1983 attempt to relitigate issues previously decided against them in state court. *Allen v. McCurry, supra*, 449 U.S. at 102. In *Allen*, the Court refused to hear a §1983 damage action which alleged as its basis an unconstitutional search and seizure because the same issue

had been raised by and decided against the federal plaintiff in a prior state court criminal proceeding. Where a party freely and without reservation submits federal claims for decision to the state courts and has them decided there, considerations of comity and repose militate against redetermination of those claims in a federal forum. — *Montana v. United States*, *supra*, 440 U.S. at 163. Moreover, federal deference to state court decisions is required by 28 U.S.C. §1738 which directs federal courts to give full faith and credit to state court judgments. *Kremer v. Chemical Construction Corp.*, 456 U.S. 461, 466 (1982).

Federal courts have frequently applied collateral estoppel in attorney discipline cases. For example, in *Goodrich v. Supreme Court of State of South Dakota*, 511 F.2d 316 (8th Cir. 1975), the Court dismissed a §1983 action brought by an attorney who alleged that the state disciplinary proceedings taken against him had not complied with due process. Since the Supreme Court of South Dakota had previously considered and decided these federal constitutional issues, the *Goodrich* Court held that relitigation was barred by the doctrine of collateral estoppel. A similar result was reached in *Coogan v. Cincinnati Bar Association*, 431 F.2d 1201 (9th Cir. 1970), where the court dismissed a civil rights action brought by an attorney to enjoin the enforcement of his suspension from the practice of law by the Supreme Court of Ohio. *See also Matter of Randall*, 640 F.2d 898 (8th Cir. 1981), *cert. denied* 454 U.S. 880 (1981) (collateral estoppel applied to prevent the raising of issues previously litigated in the context of state attorney disciplinary proceedings).

In this case, Perwin freely submitted the due process and equal protection claims contained in his federal civil

rights action to the Supreme Court of New Jersey when he applied to that Court for reinstatement to the bar in 1982. While Perwin could have based his petition and supporting brief solely on the allegation that he was entitled to reinstatement because of rehabilitation, he chose not to do so. Rather, he broadened the basis of his application and charged as well that the New Jersey disciplinary rules and practices governing disbarment and readmission violated the due process and equal protection clauses of the Constitution of the United States. In fact, Perwin's brief in support of his petition for reinstatement contained a lengthy discussion of the disciplinary rules and practices in question. Perwin's assertions were opposed by the Division of Ethics and Professional Services which submitted a brief disputing both Perwin's right to reinstatement and his federal constitutional claims. The Supreme Court of New Jersey thus considered all of these issues before denying the petition for reinstatement. Since this decision effectively rejected Perwin's federal constitutional challenge to the attorney disciplinary rules, the courts below properly found that he was barred under the doctrine of collateral estoppel from raising the same claims in this subsequently filed action. *See Allen v. McCurry, supra*, 449 U.S. at 95-103.

In his petition Perwin attempts to circumvent the application of collateral estoppel by characterizing the rejection of his application for reinstatement by the Supreme Court of New Jersey as the "administrative decision" of "a licensing board." This Court recognized in *District of Columbia Court of Appeals v. Feldman, supra*, 460 U.S. at 482, however, that state bar disciplinary proceedings are judicial in nature. *See also Middlesex County*

Ethics Committee v. Garden State Bar Ass'n, 457 U.S. 423 (1982). When the Supreme Court of New Jersey rejected Perwin's application for reinstatement, it determined as a legal matter that Perwin was not entitled to readmission to the bar and that his constitutional challenge to the disciplinary rules was without merit. Such an action is, at its essence, judicial in nature, and is neither legislative, nor ministerial, nor administrative. *Feldman, supra*, 460 U.S. at 479-482. As a final judgment of a state court in a judicial proceeding, therefore, the determination of the Supreme Court of New Jersey was entitled to collateral estoppel effect in federal court. *Allen v. McCurry, supra*, 449 U.S. at 95-103. Since the courts below properly applied the doctrine of collateral estoppel as developed in the precedents of this Court to the particular facts of this case in barring Perwin's federal action, the petition for a writ of *certiorari* should be denied.

C. The Courts Below Properly Held That The Attorney Disciplinary Practices Of The Supreme Court Of New Jersey Which Treat Disbarment As Permanent And Impose Disciplinary Sanctions On A Case By Case Basis Are Rationally Related To The Goals Of Protecting The Public And Enhancing Confidence In The Bar And Hence Satisfy The Requirements Of Equal Protection And Substantive Due Process.

In support of his petition, Perwin argues that New Jersey's practice of imposing permanent disbarment for egregious ethical violations is constitutionally infirm under substantive due process because it allegedly creates an impermissible irrebuttable presumption as to the lack of fitness of a disbarred attorney to practice law. Under the guise of equal protection, Perwin also claims that the

imposition of attorney discipline on a case by case basis—a process that enables the Supreme Court to tailor sanctions to the circumstances involved in any particular ethical violation—is inconsistent with equal protection because it allegedly leads to the discriminatory treatment of disciplined attorneys. Defendants contend that the mere statement of these claims highlights their lack of merit—a contention endorsed by both courts below when they summarily rejected all of Perwin's constitutional claims. Before analyzing these claims, however, it is important to discuss the context in which they have arisen as well as the deference which should be afforded to the disciplinary rules and practices established by the Supreme Court of New Jersey.

Since the practice of law is primarily a state concern, state courts have traditionally been accorded wide discretion in establishing standards of professional conduct and disciplinary mechanisms to enforce those standards. *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, *supra*, 457 U.S. at 434; *Aronson v. Ambrose*, 479 F.2d 75, 77 (3d Cir. 1973), *cert. denied* 414 U.S. 854 (1973); *Erdman v. Stevens*, *supra*, 458 F.2d at 1210. In fact, this Court has noted that “the States have a compelling interest in the practice of professions within their boundaries . . . [with] broad power to establish standards for licensing practitioners and regulating the practice of professions.” *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975). The states' interest in regulating lawyers is “‘especially great since lawyers are essential to the primary governmental function of administering justice. . . .’” *Ohrlik v. Ohio State Bar Assn.*, 436 U.S. 447, 460 (1978), quoting *Goldfarb*, *supra*, 421 U.S. at 792. See also *Leis v. Flynt*, 439 U.S. 438, 442 (1979).

In recognition of the substantial state interest in and control over the local bar, federal courts typically give deference to state rules, procedures, and determinations in the areas of bar admission and attorney discipline. *Mildner v. Gulotta*, 405 F. Supp. 182 (E.D.N.Y. 1975), *aff'd* 425 U.S. 901 (1976). See also *Whitfield v. Illinois Board of Law Examiners*, 504 F.2d 474 (7th Cir. 1974). Each state is free, for example, to impose high standards for bar admission and discipline, even if the standards chosen are different from—and more stringent than—the standards endorsed by other states. See *Chaney v. State Bar of California*, 386 F.2d 962, 965 (9th Cir. 1976), *cert. denied* 390 U.S. 1011 (1968). Close supervision by the states over attorney discipline is especially justified because of the public interest involved. *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, *supra*, 457 U.S. at 433-435. It is with the foregoing principles as a backdrop that Perwin's constitutional claims must be analyzed.

The disciplinary rules and practices of the Supreme Court of New Jersey are valid under the rational basis test because they are supported by legitimate state interests. See *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Analysis of the rules must be conducted under the rational basis test because neither a suspect classification nor fundamental right has been alleged in this case. *Ibid.* It is obvious that there is a rational basis for the imposition of attorney discipline on a case by case basis. As the Third Circuit recently observed in *In Re Eastern Sugar Antitrust Litigation*, 697 F.2d 524, 530 (3d Cir. 1982), "Analysis of ethical duties . . . proceeds on a case by case basis, involving the careful sifting and weighing of all relevant facts and circumstances." See also *In*

re Greenberg, 21 N.J. 213, 121 A.2d 520, 527 (1956), where the court concluded in regard to disciplinary actions that, "In the ultimate, each case must rest largely upon its own particular circumstances." A similar conclusion was reached in *Matter of Randall*, *supra*, 640 F.2d at 903 to 904. The very nature of attorney disciplinary proceedings thus demands a case by case approach, with sanctions being tailored to the particular facts and circumstances presented. Not only does such an approach make sense, but it furthers the important state interest in protecting the public through the close supervision of the bar. *Middlesex County Ethics Committee v. Garden State Bar Ass'n*, *supra*, 457 U.S. at 434. It consequently is consistent with the dictates of equal protection, as the courts below found.

Perwin also alleges that the general practice followed in New Jersey of precluding readmission after disbarment violates the due process clause in that it creates an impermissible irrebuttable presumption that the disbarred attorney is unfit to practice law. In support of this position, Perwin cites *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974), and *Stanley v. Illinois*, 405 U.S. 645 (1972). The irrebuttable presumption doctrine used in those two cases is not applicable here, however, for several reasons.

First, no irrebuttable presumption exists. In several instances, the Supreme Court of New Jersey has granted reinstatement to disbarred attorneys. Where individual situations justify readmission, therefore, it is not absolutely precluded. Even if some sort of presumption were found to exist in the New Jersey practice, then, it certainly is not "irrebuttable." See, e.g. *In re Isserman*, 35

N.J. 198, 172 A.2d 425 (1976); *In re Mink*, 60 N.J. 609 (1973) (New Jersey attorneys admitted to practice following disbarment).

Moreover, the New Jersey Supreme Court's policy toward disbarred attorneys does not "presume" anything, but rather reflects the conscious choice of one substantive policy over another. To protect the users of legal services and to instill in the public confidence in the bar, the Supreme Court of New Jersey has decided that those attorneys who engage in the most serious misconduct should generally be prohibited from resuming the practice of law. *In re Wilson*, 81 N.J. 451, 409 A.2d 1153 (1979); *In re Greenberg, supra*, 21 N.J. at 224-225, 121 A.2d at 527. Since the primary aim of imposing disbarment on a permanent basis is to protect the public, the policy does not rest on the continuing lack of fitness of the particular attorney, as Perwin alleges, but rather on the determination of the court that public confidence in the bar would be eroded if attorneys who engage in serious and abhorrent misconduct in violation of their public trust are readmitted to practice. This judgment is reflected in the substantive standard of the Supreme Court of New Jersey generally precluding reinstatement following disbarment. No presumptions—irrebuttable or otherwise—are involved here, therefore, rendering inapplicable the holdings in *LaFleur* and *Stanley* upon which the plaintiff relies. See *Younger v. Colorado State Bd. of Law Examiners*, 625 F.2d 372, 378 (10th Cir. 1980) (irrebuttable presumption doctrine found not to apply to bar admission rule which prevented individuals who had failed the Colorado bar exam three times from sitting for the exam again); *Potter v. New Jersey Supreme Court*, 403 F. Supp.

1036, 1038-1039 (D. N.J. 1975), *summ. aff'd*, 546 F.2d 418 (3d Cir. 1976) (irrebuttable presumption doctrine found not to apply to bar rule preventing the admission of individuals who attended nonaccredited law schools). In fact, were the irrebuttable presumption doctrine to be applied here as Perwin urges, it would effectively strip the Supreme Court of New Jersey of its constitutional authority to regulate the practice of law. *See Id.* at 403 F. Supp. at 1039; *see also N.J. Const.* (1947), Article VI, Section II, Par. 3.

Plaintiff's attempt to use the irrebuttable presumption doctrine in this case should also be rejected because the doctrine has been severely limited by this Court to situations quite dissimilar from the one presented here. The demise of the doctrine was advocated in a strong concurring opinion by Justice Powell in *Cleveland Board of Education v. LaFleur*, *supra*, 414 U.S. at 651, where he maintained that "irrebuttable presumptions" were really nothing more than legislative classifications which should be reviewed under equal protection analysis—that is, most commonly, under the rational basis standard. This view quickly found favor with a majority of the Court in *Weinberger v. Salfi*, 422 U.S. 749, 767-770 (1975). There the Court used the rational basis test to review duration of relationship requirements which widows needed to satisfy before qualifying for Social Security benefits. The Court distinguished *LaFleur* and *Stanley* as meriting greater scrutiny because those cases involved fundamental rights associated with the family and protected by the Constitution. *Weinberger v. Salfi*, *supra*, 422 U.S. at 771-772. Since the right to practice law is not a fundamental right protected by the Constitution, *LaFleur* and *Stanley* do not apply here and the rational basis test governs instead.

It is beyond question that the objectives of the New Jersey disciplinary practice challenged here—the protection of the public and the preservation of the public trust in the bar—are legitimate state objectives. Moreover, it is also beyond question that a policy of permanent disbarment with limited exceptions does protect the public from further harm by proven violators of the public trust, and enhances confidence in the bar by assuring the public that the most egregious violators of the canons of professional conduct will not be permitted to resume the practice of law. Consequently, the rule in issue here is rationally related to important state objectives, as the courts below found.

In applying the rational basis test, courts do not debate the wisdom of a particular policy, but rather leave such judgments to the legislative body charged with making the classification—that is, as long as its choice is reasonably related to a legitimate state objective. Whether another policy could achieve similar ends is immaterial, therefore, as long as the chosen policy meets the rational basis test. See *City of New Orleans v. Dukes*, *supra*, 427 U.S. at 303. Consequently, it is irrelevant if Perwin thinks that another rule would be better, or if other jurisdictions prefer different and less stringent rules more to his liking. Because the courts below correctly held that the challenged rules and practices met the rational basis test, this court should deny the petition for a writ of *certiorari*.

CONCLUSION

For the foregoing reasons, the petition for a writ of *certiorari* in this case should be denied.

Respectfully submitted,

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November 26, 1984

APPENDIX

Opinion of the United States District Court
for the District of New Jersey

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil No. 82-4444M

(Judge Muir-by designation)

Complaint Filed 12/30/82

STANLEY J. PERWIN,

Plaintiff

vs.

ROBERT N. WILENTZ, Chief Justice,
Supreme Court of New Jersey, et al.,

Defendants

OPINION

(Filed November 21, 1983)

MUIR, District Judge.

Plaintiff Stanley J. Perwin practiced law in the State of New Jersey until the Supreme Court of New Jersey disbarred him in 1972. Perwin has twice unsuccessfully attempted to gain reinstatement to the New Jersey bar. In this civil suit, instituted under 42 U.S.C. §1983 Perwin claims that the disciplinary rules promulgated by the Supreme Court of New Jersey pursuant to which he was disbarred violate Perwin's right to due process and to equal protection of the laws.

The Defendants in this action are the Justices of the Supreme Court of New Jersey (hereinafter the Supreme Court Defendants) and Allyn Z. Lite, Clerk of the United

App. 2

States District Court for the District of New Jersey. The Defendants have filed motions for summary judgment which are now ripe for this Court's decision.

Background

In 1971, a New Jersey jury convicted Perwin of charges of conspiracy and obtaining money under false pretenses. *State vs. Yormark*, 117 N.J. Super. 313, 284 A.2d 549 (App. Div. 1971), *certif. den.*, 60 N.J. 138, 286 A.2d 511 (1972), *cert. den.*, 409 U.S. 862 (1972). Perwin's conviction arose out of a scheme whereby various lawyers, doctors, and an insurance company employee presented false claims to an insurance company. Following Perwin's conviction, the Supreme Court of New Jersey entered an order disbarring Perwin from the practice of law in the State of New Jersey. *In Re Perwin*, 60 N.J. 171, 287 A.2d 3 (1972). The Supreme Court's disbarment order stated that in light of Perwin's expressed intent to seek further review of his conviction "[s]hould he prevail in those efforts, he may apply to us for reconsideration of this Order." Memorandum of Law in Opposition to Defendants' Motion for Summary Judgment (hereinafter "memo in opposition"), exhibit A.

Following his disbarment, Perwin successfully petitioned the United States District Court for the District of New Jersey for a writ of habeas corpus pursuant to 28 U.S.C. §2254. The habeas corpus order declared Perwin's conspiracy conviction defective on double jeopardy grounds. The order declared Perwin's conviction on the related charges defective for other reasons and indicated that retrial on those charges would be appropriate. The state elected not to retry Perwin.

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In 1974, Perwin petitioned the Supreme Court of New Jersey for reconsideration of its disbarment order and reinstatement of Perwin to the New Jersey bar. *See* Affidavit of Stephen W. Townsend (hereinafter "Townsend affidavit"), exhibit A. The New Jersey Supreme Court remanded the matter to the Essex County Ethics Committee "for a hearing on the record made at the criminal trial and preparation of its findings thereon. . . ." *Id.*, exhibit B. The Ethics Committee held a hearing at which Perwin testified and thereafter recommended that Perwin's petition for reinstatement be denied. *Id.*, exhibit F. On October 20, 1976, the New Jersey Supreme Court denied, without opinion, Perwin's petition for reinstatement. *Id.*, exhibit G.

In 1981, Perwin again petitioned the New Jersey Supreme Court for reinstatement to the New Jersey bar. *Id.*, exhibit H. In filing this petition, as well as his first petition, Perwin was represented by counsel. In the brief in support of his petition, *Id.*, exhibit I, Perwin argued that under New Jersey law Perwin was eligible for reinstatement. In addition, pages 20 through 22 of the brief argued that the disciplinary rules promulgated by the New Jersey Supreme Court contravened the due process and equal protection clauses of the fourteenth amendment of the United States Constitution. Specifically, Perwin stated that "the failure of the Court, under its Constitutional procedures, to establish reasonable standards and guidelines by which a disbarred attorney can seek reinstatement and, by its action in reinstating only a select few who have applied, denies him the right to practice law without due process and in so doing denies him equal protection of the law." The Division of Ethics and Professional Services of the Administrative Office of the Courts of the State

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of New Jersey submitted a brief in opposition to Perwin's petition for reinstatement. The Division's brief devoted four pages to a discussion of Perwin's constitutional claims. *Id.*, Exhibit J. On April 27, 1982, the Supreme Court of New Jersey issued an order denying, without opinion, Perwin's motion for reinstatement. *Id.*, exhibit L. Perwin did not appeal the supreme court's order to the United States Supreme Court. Rather, in December of 1982, Perwin filed his civil rights action in federal court. Perwin seeks declaratory and injunctive relief including an order requiring the Supreme Court of New Jersey to grant him a hearing regarding readmission to the New Jersey Bar and "a writ of mandamus requiring the Supreme Court of New Jersey to show cause why the Plaintiff should not be admitted to the practice of law."

Discussion

The exact nature of the legal theories upon which Perwin bases this civil rights action is somewhat difficult to discern. Perwin claims that Rule 1:20 of the Supreme Court of New Jersey violates the equal protection and due process clauses of the federal constitution both facially and as applied to him because it does not contain formal standards governing attorney discipline and readmission of disbarred attorneys. He argues that the sanctions of disbarment and temporary suspension from the practice of law are "unevenly administered" and therefore the New Jersey Supreme Court's imposition of attorney discipline violates the equal protection clause. Perwin alleges that the New Jersey Supreme Court has imposed discipline essentially on a case by case basis and that "discipline has been disparate and discriminatory and

therefor in violation of the equal practice of the law [sic] provision of the Constitution." Complaint, ¶18.

Further, Perwin argues that the general rule that disbarment is permanent creates an irrebutable presumption that disbarred attorneys are forever unfit to practice law, thereby violating the due process clause of the fourteenth amendment. He claims that the New Jersey disciplinary rules are "overbroad and vague, indefinite, and imprecise, in violation of the First and Fourteenth Amendments. They deprived the Plaintiff of the liberty to choose his profession and the right to pursue his chosen profession, depriving Plaintiff of due process and equal protection of the law." Complaint, ¶24. Perwin also alleges that the rules are "arbitrary and capricious."


In the second count of his complaint, Perwin contends that New Jersey Supreme Court Rule 1:20 is inconsistent with Rule 7G of the United States District Court for the District of New Jersey, which provides that "an attorney who has been disbarred may seek readmission after the expiration of five years." Complaint, Count II, ¶3. Perwin asserts that because of this alleged inconsistency, Rule 1:20 violates the Supremacy Clause of the United States Constitution. In the third count of his complaint, Perwin seeks an order directing Defendant Lite, Clerk of the United States District Court, to provide him with the forms required for admission to the Bar of the United States District Court for the District of New Jersey. This request appears to rest on the theory that although the District Court limits admission to its bar to members of the Bar of ~~the~~ State of New Jersey and because Perwin's non-membership in the New Jersey state bar is unconstitutional, he must be allowed to apply for admission to the

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bar of the District Court. In his memorandum in opposition to the Defendants' motion for summary judgment, Perwin makes no reference to the Rules of the U.S. District Court for the District of New Jersey or to Defendant Lite.

We first consider the motion of Defendant Allyn Z. Lite, Clerk of the United States District Court for the District of New Jersey, for summary judgment. Lite claims that he is entitled to judgment as a matter of law because Perwin fails to state any claim upon which relief can be granted against Lite. Perwin's complaint cites New Jersey District Court Rule 7G in support of his claim against Defendant Lite. Rule 7G, however, applies to reinstatement of attorneys previously admitted to 'practice before the New Jersey District Court. Perwin does not assert that he was once admitted to the bar of the District Court. Therefore, Rule 7G has no application to him. Furthermore, Rule 4 of the District Court of which we take judicial notice, provides, with limited exceptions, that admission to the New Jersey State Bar is a prerequisite to admission to the District Court Bar. Thus, even if Perwin asserted that he had once been admitted to the District Court bar, his present non-membership in the New Jersey bar precludes his admission to the District Court Bar. We perceive no merit in Perwin's theory that he is entitled to apply for admission to the District Court bar because of his pending claim that his non-membership in the New Jersey Bar is unconstitutional. Perwin has not established any basis whatsoever for a judgment against Defendant Lite.

We next consider the Supreme Court Defendants' motion for summary judgment. The Supreme Court De-



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fendants assert the following arguments in support of their motion. First, they claim that Perwin is asking this Court to review a judicial proceeding by the Supreme Court of New Jersey and that this Court therefore lacks subject matter jurisdiction of Perwin's complaint. Second, they argue that Perwin already raised his constitutional claims before the Supreme Court of New Jersey and that litigation of those claims in this Court is now barred by the doctrine of collateral estoppel. Third, they claim that Perwin's due process claim lacks merit in that Perwin has not established that he has a property or liberty interest in reinstatement to the bar and therefore has no interest protected by the due process clause, or that, assuming Perwin does have a protected interest, the New Jersey disciplinary rules comport with due process. Finally, the Supreme Court Defendants claim that Perwin's equal protection claim must fail because any distinctions drawn by the New Jersey Supreme Court's rules and practices are rationally related to legitimate state interests.

The United States Supreme Court recently held that federal district courts lack subject matter jurisdiction to review a state supreme court decision denying admission to the bar to a particular applicant. *District of Columbia Court of Appeals vs. Feldman*, 103 S. Ct. 1303 (1983). Such a decision constitutes a judicial proceeding and therefore is reviewable only in the Supreme Court of the United States. *Feldman* does not preclude district court jurisdiction to hear constitutional challenges to disciplinary rules of general applicability which were promulgated in non-judicial proceedings. However, where such a challenge is "inextricably intertwined" with a state supreme court decision involving a particular candidate for admission to the bar, a federal district court has no jurisdiction

to review the state supreme court decision. *Id.* at 1315 n. 16. Perwin does challenge the disciplinary rules of the New Jersey Supreme Court in general. At the same time, however, he argues that the New Jersey Supreme Court acted improperly in denying his application for reinstatement. Perwin's affidavit (attached to his memorandum in opposition) and his brief both assert that Perwin has been rehabilitated and is now fit to practice law. Perwin argues that he as an individual was more harshly disciplined than other individuals similarly situated. *See, e.g.* memo in opposition at p. 6, 28. To the extent that Perwin asks this Court to review the wisdom or constitutionality of the New Jersey Supreme Court's action denying his petition for reinstatement, this Court clearly lacks jurisdiction to do so under *Feldman*. With regard to Perwin's challenge to the disciplinary rules in general, we are of the view that Perwin's general challenge is "inextricably intertwined" with his challenge to the New Jersey Supreme Court's decision regarding his own application, thereby depriving this Court of jurisdiction to hear this case.

Assuming, however, that this Court has jurisdiction to hear Perwin's challenge to the constitutionality of the disciplinary rules in general, we agree with the Supreme Court Defendants that Perwin's due process and equal protection claims are barred by the doctrine of collateral estoppel. Perwin raised his due process and equal protection claims before the New Jersey Supreme Court and that court rejected those claims. After Perwin's constitutional claims were rejected by the New Jersey Supreme Court, Perwin's only recourse was to appeal to the United States Supreme Court under 28 U.S.C. § 1257(2). Because he chose not to appeal to the United States Supreme

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Court, he is now barred from collaterally attacking the judgment of the New Jersey Supreme Court by relitigating his federal constitutional claims in this Court. *Allen vs. McCurry*, 449 U.S. 90 (1980); *Tang vs. Appellate Division of New York Supreme Court, First Department*, 487 F.2d 138 (2d Cir. 1973), *cert. denied*, 416 U.S. 906 (1974); *Korup vs. Flaherty*, 524 F.Supp. 1160 (E.D. Pa. 1981) (Luongo, J.); *Adams vs. Supreme Court of Pennsylvania*, 502 F.Supp. 1282 (M.D. Pa. 1980) (Nealon, J.).

Perwin attempts to avoid the collateral estoppel doctrine by arguing that he did not have a full and fair opportunity to litigate his constitutional arguments before the Supreme Court of New Jersey and that that court did not decide the constitutional issues presented by Perwin. As noted above, both Perwin and the Division of Ethics and Professional Services addressed due process and equal protection arguments in their briefs regarding Perwin's 1981 application for readmission. The Supreme Court of New Jersey was constitutionally obligated to consider Perwin's federal constitutional claims. *Allen vs. McCurry*, 449 U.S. at 105. Thus, we must reject Perwin's claim that the New Jersey Supreme Court might not have considered Perwin's constitutional claims. That Court necessarily decided those claims adverse to Perwin.

The fact that the New Jersey Supreme Court denied Perwin's second application for reinstatement without opinion does not require a different conclusion. Several courts have noted that the absence of a written opinion does not eliminate the presumption that constitutional claims presented to a court were decided by the court. In *Tang vs. Appellate Division*, 487 F.2d at 141, n. 2, the

Court quoted the United States Supreme Court's statement of this principle:

The question of the constitutional validity of the order was distinctly presented by the appellants' petition and necessarily was resolved against him by the judgment affirming the order. Omitting to mention that question in the opinion did not eliminate it from the case or make the judgment of affirmance any the less an adjudication of it. *Grubb vs. Public Utilities Commission*, 281 U.S. 470, 477-78 (1930).

In a case factually similar to this case, Judge Luongo held that a frustrated bar applicant's constitutional arguments were barred by collateral estoppel after those arguments had been presented to the Pennsylvania Supreme Court in the applicant's petition, despite the fact that his petition was denied without opinion. *Korup vs. Flaherty*, 524 F.Supp. 1165 (E.D. Pa. 1981). *See also*, *Winters vs. Lavine*, 574 F.2d 46, 60-61 (2d Cir. 1978).

To the extent that any of Perwin's constitutional claims were not decided by the Supreme Court of New Jersey, those claims appear to be meritless. Perwin's Supremacy Clause claim is frivolous. The Rules of the United States District Court for the District of New Jersey do not purport to affect the State of New Jersey's power to adopt and enforce attorney disciplinary rules.

Perwin's due process claim fails for two reasons. First, Perwin does not have any liberty or property interest in readmission to the New Jersey bar and therefore cannot claim that he is entitled to due process clause protection. New Jersey state law does not support any "legitimate claim of entitlement" by a disbarred attorney to readmission to the bar. *See Board of Regents vs. Roth*,

488 U.S. 564, 577 (1972). Perwin recognizes this when he argues that there is an "irrebutable presumption" that a disbarred attorney is forever unfit to practice law. *See* Memo in Opposition, at 22-23. In *Re Wilson*, 81 N.J. 451, 409 A.2d 1153 (1979). Any liberty interest that Perwin may have had in maintaining his reputation and livelihood as an attorney was lost by him following his disbarment. Moreover, Perwin was granted a hearing in connection with his first petition for reinstatement in 1974. Even assuming that Perwin does have a liberty or property interest in reinstatement to the New Jersey Bar, New Jersey's lack of formal rules governing reinstatement do not violate due process. *See* *Law Student's Civil Rights Research Council vs. Wadmond*, 401 U.S. 154, 159 (1971). Perwin's "irrebutable presumption" argument is undermined by Perwin's recognition of the fact that the New Jersey Supreme Court has, on occasion, reinstated disbarred attorneys. *See* memo in opposition at 27-28. Perwin's equal protection claim fails because the action of the Supreme Court of New Jersey in imposing attorney discipline on a case by case basis is rationally related to a legitimate state interest. *See* *Matter of Randall*, 640 F.2d 898 (8th Cir.), *cert. denied*, 454 U.S. 880 (1981).

For all of the foregoing reasons, the Court will grant summary judgment in favor of all of the Defendants.

/s/ Malcolm Muir,
U.S. District Judge

Dated: 11/17/83